Hobbes on the International Rule of Law

David Dyzenhaus

Perhaps the most influential passage on the rule of law in international law comes from chapter 13 of Thomas Hobbes's *Leviathan*. In the course of describing the miserable condition of mankind in the state of nature, Hobbes remarks to readers who might be skeptical that such a state ever existed that they need only look to international relations—the relations between independent states—to observe one:

> But though there had never been any time, wherein particular men were in a condition of warre one against another; yet in all times, Kings, and Persons of Soveraigne authority, because of their Independency, are in continuall jealousies, and in the state and posture of Gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their Forts, Garrisons, and Guns upon the Frontiers of their Kingdomes; and continuall Spyes upon their neighbours; which is a posture of War.[1]

The passage is influential because realists take Hobbes not only to be describing international relations but also making a statement about what international relations should be—an arena in which individual states relentlessly pursue goals that they take to serve their particular interests. It has to be that way, on the view traditionally attributed to Hobbes, because the conditions that make the rule of law possible within a state—namely, an absolute sovereign with a monopoly on the power to make, enforce, and interpret the law—are so conspicuously lacking in the international arena.

Hobbes's view that these three functions have to be united in one person or body to avoid chaos has been rejected for some time. But even if one supposes that an effective rule of law requires a separation of powers between the legislature, the executive, and the judiciary, that separation occurs within a unified state in

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which there is some ultimate locus for each function; and no plausible equivalent exists and is likely ever to come into existence in the international arena. And yet international law exists, and critics of realism can point to examples of compliance by states with international law where such compliance seems plausibly to be against state interest. Hence, these critics argue, since international law constrains the power of sovereign states, there is an international rule of law, even though the international legal order lacks the institutional framework that we consider essential for the rule of law within states.

However, this argument from actual examples is problematic because the practice of state compliance with international law is not that easily demonstrated to be the product of legal constraint. Indeed, the problem goes beyond international law since the practice whereby a state generally complies with its own domestic law is hardly different in this respect, as I will show in the next section. But, as I will also try to show, this phenomenon does not so much demonstrate the truth of realism as that the ultimate questions in debates between realists and their critics are normative questions about how best to construct practice, and not only questions about how best to describe it. To think that Hobbes, to take just one prominent example, was providing only a description of state practice in the quotation above is to misunderstand what question he was asking when he inquired into whether the rule of law is possible, in domestic affairs or on the international level.

It mattered, of course, a great deal to Hobbes that the rule of law could be realized in practice. *Leviathan* is written in large part as a book of instruction so that people, with the help of a "very able Architect" (the sovereign), can avoid constructing a "crasie building, such as hardly lasting out their own time, [that] must assuredly fall upon the heads of their posterity."[2] So part of Hobbes's question whether the rule of law is possible at all has to do with whether the rule of law can help to sustain the edifice of civil society over time. But his main question is how it is possible that those subject to the de facto power of a sovereign could consider his enacted law as obligatory—as having de jure or legitimate authority over them. In short, the question is mainly a normative one: Why should the law be considered a source of obligations in the first place?

Hobbes gives the following clear answer to this question. If one is living under the protection of a de facto sovereign, one can be presumed to have consented to recognize his law as authoritative over oneself because it is rational to prefer the protection of any sovereign to the chaos of the state of nature.[3] Hobbes then seems

to reconfigure the venerable contrast between the rule of law and the arbitrary rule of men into a contrast between being subject to the arbitrary rule of one person or group of persons—the sovereign—and being subject to the arbitrary will of all other individuals in the state of nature. The former is rationally preferable to the latter because, as the product of just one person or group with a monopoly on coercion, it can provide those subject to it with the legal order that makes secure and peaceful interaction between subjects possible.

It is easy to see how realism might be thought to be consistent with this normative position. Since there is no international sovereign, all we have in international relations is the jostling for power of individual states, each seeking to impose its will on the others. To the extent that there is international law, it constrains states only insofar as they find it in their interest to abide by its rules, which means that the most powerful states in the international order are more or less unconstrained. On this view, international law is no more than the instrument of legally unconstrained (though politically constrained) state power, an instrument that sovereigns use in order to promote their interests. Because the law is no more than an instrument, sovereigns may act outside international law or even against it if they deem it useful and have the political power to do so.

I will suggest that if realism is right about international law, the rule of law is no more possible in domestic orders than it is in the international order. Realism, if true, is true all the way down. That conclusion of course supports rather than refutes realism. But my broader point is that realism, whether about the domestic or the international order, is ultimately not a descriptive account of practice, but a normative theory. Practice can be made to correspond to it, but that is a matter of normative choice. It is possible to construct a political world, whether domestic or international, along realist lines. But it is also possible to construct it along legalist lines. Since, as I think I can safely assume, we live in worlds that are admixtures of realist and legalist elements, there is a normative choice to be made about whether to make these worlds more or less subject to the rule of law.

However, my main point is that there is much more to the content of the choice for legalism and to Hobbes's answer to the normative question than is commonly supposed. Submission to a sovereign is not submission to the arbitrary rule of one person. It is submission to the rule of one artificial person whose identity is legally constituted, and who not only rules through law but also in accordance with the rule of law.[4] Submission to sovereignty is thus ultimately submission to the rule of law. And that explains both why law can be treated domestically

as a source of obligations and why international relations are governable by the rule of law.

Realism about Domestic Law

In his well-known book *The Dual State* (1941), Ernst Fraenkel argued that the Nazi state consisted of two states that existed side by side: the normative state, which contained whatever remained of the law and the actual institutions of the pre-Nazi legal order, and the prerogative state, which consisted of the apparatus of the Nazi party wherein the leader's will (his actual will or his will as interpreted by subordinate officials) was the ultimate source of authority.[5] Fraenkel pointed out that the rule of law did not obtain in Nazi Germany because the law of the normative state governed relationships between individuals and between individuals and state institutions only as long as officials in the prerogative state did not find such government inconvenient. Put positively, a Nazi official could override the law or the institutions of the normative state whenever this was thought to be in the interests of the party, which were considered to be synonymous with the interests of the German nation. Thus, if you were an "Aryan," heterosexual civilian during the Nazi era, it was quite likely that most or even all of the time your encounters with the state and your legal transactions with other civilians would be entirely governed by the rules and institutions of the normative state. However, you were not subject to the rule of law because the normative state governed your life only to the extent that the prerogative state did not find such government inconvenient.

The example of the dual state shows why realism about international law cannot be refuted by pointing out that states comply with international law most of the time. For if the more powerful states comply with the law only when they find it convenient, even if they happen to do this most of the time, the international legal order is the equivalent of the legal order of the normative state, and the more powerful states are best understood as competing prerogative states. And even if one can plausibly claim that in particular cases a state seemed to forego some advantage by complying with the law, it is all too easy to explain such cases as procuring some competing advantage, for example, by encouraging other states to enter into trade relationships with it that are beneficial in the long term.

This version of a realist argument goes much further than debunking the claim that international relations are governed by the rule of law, since it also debunks the claim that domestic relations are governable by the rule of law. It takes Fraenkel's description of the Nazi state as a dual state to apply to all states, so that the Nazi state differs from liberal democratic states only in that the prerogative state was completely visible in it, whereas in liberal democracies it recedes into the background, concealed by what it supposes is a thin veneer of business-as-usual legality. That the rule of law is no more than this veneer is "proved" by the fact that when business can no longer be conducted as usual because a situation arises that existing law does not regulate, an official will have to make a legally unconstrained decision about how to respond to that situation. According to this argument, while such situations pervade all legal orders, the veneer of legality can be maintained because these situations do not generally pose a dramatic challenge to the sense that business is as usual. Dramatic situations do arise from time to time, in the form of existential challenges to the order—the situations that we term a state of emergency—and in such situations law recedes and the prerogative state comes to the fore.

This line of argument was most clearly articulated by Carl Schmitt in the Weimar era, most famously in *Political Theology* (1922), which starts with the lapidary claim, "Sovereign is he who decides on the exception."[6] Schmitt here deliberately plays on the ambiguity between the claim that the political sovereign is the one who decides how to respond to a state of emergency or exception and the claim that the political sovereign is the one who decides whether a situation is exceptional. Indeed, he wished to convey that the political sovereign decides both when there is an emergency and how to respond to it.

What we can think of as Schmittean realism is not then skeptical only about the rule of law in international law; it is also skeptical about the rule of law in general. Law is a mere instrument of state power, which the state deploys at its convenience. Schmittean realism is not, however, just one version of realism found in realist international relations theory; rather, it is Schmitt's political and legal theory that underpins other contemporary versions, because his account best articulates realism's claims about the foundations of international relations and international law.[7]

Note that Fraenkel took Schmitt's theory to be the most important justification of the dual state, but rejected utterly what he regarded as the deceptive attempt by Schmitt and others to prove the inevitability of that state by appeals to practice. In other words, Fraenkel took Schmittean realism not to be aimed at describing the

practice of the rule of law, whether domestically or internationally, but to be a normative argument against the kind of political order constituted by the rule of law.

Such an argument starts with features of legal practice that are vulnerable to being described in realism's terms and uses these as building blocks for a broader argument that includes all of legal practice in its scope, and which seeks to reconstitute it in its image. Thus the small pockets of apparent indeterminacy in the law (that is, where it is not clear how the law regulates a situation so that an official has to decide) are said to be pockets of uncontrolled discretion. That is then inferred to be but one end of the continuum of such situations. At the other end is the state of emergency—both an existential threat to the whole order and one in which the sovereign has unlimited authority to act, which "proves" that even when things seem to be working as business as usual, the prerogative state has simply receded into the background.

Fraenkel's insight is that Schmittean realism is at base normative in that it is designed to bring the dual state into existence. In this regard, it is no different methodologically from the "legalist" argument, which describes the small pockets of apparent indeterminacy in the law as fully regulated by law, and similarly claims that states of emergency are in principle fully regulated by law and that the international order can be subject to the rule of law. In the next section I will focus on the issue of apparent indeterminacy in the law, and will argue that it illuminates the complex relationship between the normative and the descriptive in a way that ultimately favors legalism over realism.

Legislation, Interpretation, and the Rule of Law

In *Peace Through Law* (1944) the great legal theorist and international lawyer Hans Kelsen said that "it is the essential characteristic of the law as a coercive order to establish a community monopoly of force."[8] He added that even in a "primitive legal community" there is such a monopoly. While the principle of "self-help" prevails in that it is up to individuals in the community rather than institutions to interpret and enforce the law, the individuals still think of themselves as interpreting and enforcing the law of the community, and that means that what they do is "the exercise of the community monopoly of force."[9]

Kelsen's main argument is that the international order needed to develop a system of compulsory adjudication if it were to escape from a state equivalent to a primitive legal community. Similarly, Kelsen's equally illustrious student,

Hersch Lauterpacht, argued in *The Development of International Law by the International Court* (1958)[10] that submission to compulsory jurisdiction goes a long way to solving the problem of international law's "immaturity."[11] But, it is important to see, both Kelsen and Lauterpacht thought that international law has no less a claim to be a legal order than domestic law, even if it is in a primitive or immature state. This idea depends on a claim shared by both that there is a distinction between legislation and adjudication, even in a primitive legal order.

Consider, for example, a group of five children playing a winner-takes-all, war-like game with several complex rules that raise difficult issues of interpretation in particular situations. At a certain point in the game, one of the children, Luke, whose turn it is, offers a sophisticated argument about why one of the rules should be interpreted in a way that will significantly advantage him. The argument relies on the text and an interpretation of the same rule in a somewhat analogous situation in a previous iteration of the game where the group had all agreed on how to proceed. The others, who stand to lose if Luke is right, offer an equally sophisticated argument in response. The debate rages over several minutes, until Luke agrees that the majority interpretation is correct and the game proceeds with Luke correspondingly disadvantaged.

One way of understanding this example is in purely realist terms. The majority simply outvoted Luke because it happened to be in their interest to do so at that particular point in time—a crucial juncture in a game of the sort that often attracted such interpretative disputes. Further, Luke fell in with their decision because he had to, if he were to continue in that game and if he wanted to be trusted to be a participant in future games. The only norm that could be extracted from the example would be that in cases of controversy the actor with the most power can legislate a self-interested answer. In the context of this game, that one turns out to be the majority of the group. As Hobbes put it, "To [the legislator] . . . therefore there can not be any kind of knot in the Law, insoluble; either finding out the ends, to undoe it by; or else making what ends he will (as *Alexander* did with his sword in the Gordian knot) by the Legislative power; which no other interpreter can doe."[12]

Notice, however, that Hobbes implicitly distinguishes between two ways in which the legislator, who is also the final interpreter of the law, may deal with a seemingly insoluble problem of interpretation. The first finds a solution within the law that shows that the problem was not in fact insoluble—the knot is undone. The second does not so much find as impose a solution—it cuts through the knot.

Only the first solution is properly interpretative of the law; and while both solutions have authority because they emanate from the legislator, the authority they have is different: respectively, the authority to issue the definitive or final interpretation of the law and the authority to make law. And as we know from the variety of ways of constructing a legal order, it is perfectly possible and considered by many (contra Hobbes) to be desirable to locate these two kinds of authority in separate institutions.

Only the distinction between interpretation and legislation can respond to the fact that Luke and the other children in the game regard themselves as not only players bent on winning but also as judges—interpreters of the rules legislated by a supreme legislator. When they occupy the judicial role, they accept certain commitments: to be bound by the text of the rules; to offer reasonable interpretations of what a rule requires in cases where it is controversial; to take into account for the sake of fairness the way in which the rule has been previously interpreted in analogous situations; to treat each participant as an equal when it comes to interpretation.

These commitments make it possible for the players to adopt as a regulative assumption of the game that its rules make up a unified system that contains an answer to all possible questions that might arise about the application of the rules. Because there is only one level of judges—there is no final or any court of appeal—these commitments have to be taken all the more seriously in order to maintain trust, in particular the requirement to offer only reasonable interpretations of the rule. That is, because those who are locked in dispute with each other are judges in their own cause, there is much more pressure on them to achieve agreement on the most reasonable interpretation of the rules than in a legal order with a separation of powers and a hierarchically organized judiciary.

While one can explain, then, why the majority qua judges offered interpretation *x* while Luke qua judge offered *y* in terms of the fact that *x* advances the majority's interests and *y* Luke's, neither *x* nor *y* is reducible to those interests. Indeed, during the course of the interpretive dispute, the players qua judges accepted the onus of showing precisely why the different interpretations were not reducible to a given player's interests. Put differently, the interests provide motives for preferring one interpretation to another, but they do not qualify as *reasons* that justify either interpretation. If, by contrast, a player insists on an unreasonable interpretation, that interpretation would be reducible to

self-interest—more accurately, it would not even count as an interpretation—and the player would show himself unfit to be trusted to play the game. If he were playing the primitive society game of self-help, he would have shown that he cannot be "received into any Society," as Hobbes said of the "Foole," who says there is no such thing as justice, and so considers himself entitled to ignore the law when he thinks it expedient.[13]

Notice that in the game all the participants have equal freedom to decide what is in their best interests as well as equal authority as interpreters of the rules. We could say that they are sovereign in these respects and that the fact that they regard themselves as obligated by rules they have not themselves made does not detract from their sovereign status. Were it not for these rules—the rules constitutive of the game—they would have no such status. But it is important to see that when they play the game, they do more than subscribe to a set of authoritative rules. They also subscribe to the principles of interpretation that permit them to consider themselves free and equal participants, even when they submit to an interpretation with which they disagree.[14] These principles are not themselves part of the rules of the game. Rather, they discipline the content of the rules through the interpretative process. As such, they make up what we can think of as the natural law of the game.

I want thus to suggest that the position of states in the international order is much like the position of the players in this game. The point is deeper than that the sovereign states of the international order find themselves always entangled in international law as they consider how best to advance their interests. It is that they are themselves creatures of international law, and to maintain their status as sovereign states they must treat as binding the law that constitutes the jural community of which they are a part. Hence, when one state raises a question about the legality of another's action or proposed action, that state must accept the onus of justifying its action as having a warrant in a reasonable interpretation of the law.

The major difference between the children's game and the relationship of states is that while the goal of the game (as with nearly all games) is to be the only player left standing, the goal of any legal order, no matter how primitive, is to secure, as in Kelsen's title, peace through law. When interpretive disputes break out in a legal order, the participants are under an obligation qua judges to show that their understanding of the rules advances the goal of securing peace.[15] That goal also

provides the impetus for developing the institutions that make legal orders, including the international order, more mature.

To the extent that the international legal order has developed such institutions, it is less fragile than the order of the game. But one has to take into account that, as Hobbes pointed out, even in a domestic legal order one can make the claim that the laws are no more than "Cob-webs" because "potent men" have got away with breaking them, leaving only the "weaker sort" to be caught.[16] According to Hobbes, those who make this claim reason that:

> Justice is but a vain word: That whatsoever a man can get by his own Industry, and Hazard, is his own: That the Practice of all Nations cannot be unjust: That Examples of former times are good Arguments of doing the like again.[17]

In this passage Hobbes not only rejects the main premise of realism, which he regards as the position adopted by the Foole who thinks that his perception of self-interest is the measure of appropriate action, but also makes it clear that this premise does not necessarily hold in international relations. The direct implication is that the practice of any nation can be judged according to standards of justice. Since for Hobbes justice is a property of law, the practice of nations can be law-governed. Indeed, in *Leviathan* he says that sovereigns are governed by the same law that governs men who have "no Civil Government." Both sovereigns and such men are still subject to the laws of nature, but subject in the sense that they are bound "in the Conscience onely," there "being no Court of Naturall Justice."[18] This sense of being bound is elaborated in a famous passage in one of the two chapters in which Hobbes sets out his extensive account of the laws of nature, where he distinguishes between being bound only by one's conscience, *in foro interno*, and being bound to act, *in foro externo*.[19]

Now it might seem that this sense of obligation is empty since Hobbes emphasizes that in civil society the sovereign's interpretation of what the laws of nature require is definitive, as is the individual's interpretation in the state of nature. However, as Noel Malcolm has argued, Hobbes is not a realist in the sense that he thinks that no moral rights and duties exist in international relations, but only in that he does not think that international relations can ever achieve the presumed "harmony" of civil society.[20] As Malcolm points out, Hobbes does not confine the situation where the laws of nature bind *in foro externo* to that of civil society. One is bound *in foro externo* as long as one has assurance of performance from the other party to a contract, which means that if the other party

performs his part of the contract in the state of nature, one is bound to reciprocate.[21] In other words, *in foro externo* obligation is not confined to the situation in which state coercion will follow failure to perform; it also arises where failure to perform is immoral because one is under an obligation to respond to another's performance.

Malcolm shows that there are important lessons to be learned from Hobbes's theory of international relations. Moral laws do exist both in the state of nature and in international society. But generally one will have the right to act in ways that violate those laws unless there are special circumstances, notably when one has entered into an agreement with another and the other has performed his part of the agreement.[22] In addition, Malcolm shows that Hobbes not only saw how treaties and agreements could stabilize international relations but also how a common culture of shared values could provide a basis for stability. In this second respect, Malcolm points out that when it came to culture, Hobbes thought it just as important that the sovereign make political education part of the internal project of achieving stability within the state.[23]

If this were realism about international law, both Kelsen and Lauterpacht would be realists. Both regard international law as the product of states that have made a normative commitment to being part of a legal community, which requires that the states understand that they bear the onus of justifying their actions on the basis of reasonable interpretations of existing law. The only serious difference between them was that Kelsen rejected natural law. But, as Lauterpacht argued, it is difficult to make sense of law, whether domestic or international, without the idea of principles of natural law that stem from the project of achieving peace through law between free and equal individuals, whether natural individuals or states. In addition, he made a strong case that Kelsen's own understanding of the international law project is best understood in terms of that idea.[24]

I believe the same to be true of any thinker who wishes to understand the promise of legality or the rule of law, which is why we find that on closer inspection the alleged founder of realism about international relations and international law rejects realism's main premise. My argument here has been that that premise should be rejected because it cannot account for the distinction between legislation and interpretation, a distinction we need in order to make sense of any rule-bound activity—even a game where the goal is winner takes all. Since realism does not describe accurately what it is to play even the winner-takes-all game, it is no

surprise that it fares even worse when it comes to the law game, including the international law game, the goal of which is to secure peace between all the players.

NOTES

[1] Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996), p. 90.
[2] Ibid., p. 221.
[3] Ibid., ch. 18, especially pp. 128–29.
[4] See David Dyzenhaus, "Hobbes on the Authority of Law," in Dyzenhaus and Thomas Poole, eds., *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012), p. 186.
[5] Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Octagon Books, 1969), first published 1941.
[6] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, 1998), revised edition of 1934, p. 5.
[7] There is also a direct genealogical link between contemporary versions of realist international relations theory and Schmitt through the work of perhaps the most influential realist of the last century, Hans Morgenthau. See William E. Scheuerman, *Morgenthau* (Cambridge: Polity Press, 2009). While Scheuerman shows that Morgenthau's engagement with Schmitt was complex, as was correspondingly his realism, he also suggests that Morgenthau's followers neglect the complexity and espouse a realism that is closer to Schmitt than to Morgenthau. Both Fraenkel and Morgenthau were protégés of the social democratic lawyer, and "father" of German labor law, Hugo Sinzheimer; see Scheuerman, pp. 12–14.
[8] Hans Kelsen, *Peace Through Law* (Chapel Hill, N.C.: University of North Carolina Press, 1944), pp. 3–4.
[9] Ibid.
[10] Hersch Lauterpacht, *The Development of International Law by the International Court* (London: Stevens & Sons Limited, 1958).
[11] Ibid., p. 158.
[12] Hobbes, *Leviathan*, p. 191.
[13] Ibid., pp. 102–103.
[14] Kelsen made precisely this point when he argued that sovereignty is fully compatible with submission to the jurisdiction of an international tribunal. Judicial decisions, he said, are "objective and impartial," and "not political decrees issued according to the principle, which is a negation of law, that might goes before right"; Kelsen, *Peace Through Law*, p. 48. He continued: "Even if the decision of an international tribunal does not constitute the strict application of a pre-existing legal rule, it is supposed to be founded on at least the idea of law—that is, on a rule which although not yet positive law, ought, according to the conviction of independent judges, to become law and which really becomes positive law for the case settled by the particular judicial decision. It is the submission to the law, to the law not as a system of unchangeable values, but as a body of slowly and steadily changing norms, which is not incompatible with the principle of sovereign equality since it is only this law that guarantees the co-existence of the States as sovereign and equal communities." Ibid., pp. 48–49.
[15] For a treatment of international law that elaborates this kind of theme, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).
[16] Hobbes, *Leviathan*, p. 204.
[17] Ibid.
[18] Ibid., p. 244.
[19] Ibid., p. 110.
[20] Noel Malcolm, "Hobbes's Theory of International Relations," in Malcolm, *Aspects of Hobbes* (Oxford: Clarendon Press, 2004), pp. 431, 455–56.
[21] Hobbes, *Leviathan*, p. 102. Malcolm, "Hobbes's Theory of International Relations," p. 438.
[22] Malcolm, "Hobbes's Theory," pp. 445–46.
[23] Ibid., pp. 449–55.
[24] Hersch Lauterpacht, "Kelsen's Pure Science of Law," in W. I. Jennings, ed., *Modern Theories of Law* (Oxford: Oxford University Press, 1933), p. 105.